

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 20, 2007 Session

**PHILLIPS CONTRACTOR'S AND MANAGEMENT, LLC v. STEALTH
GROUP, LLC, ET AL.**

**Appeal from the Chancery Court for Loudon County
No. 10827 Frank V. Williams III, Chancellor**

No. E2006-01960-COA-R3-CV - FILED MAY 10, 2007

In this breach of contract case, the trial court awarded the plaintiff contractor the remaining gross balance due under its construction contract with the defendants. Upon our determination that the award of damages should have been the plaintiff's lost net profits, we vacate the trial court's judgment and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Cause
Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

H. Douglas Nichol and Harold C. Wimberly, Knoxville, Tennessee, for the appellants, Stealth Group, LLC; Double T. Builders, LLC; and Dave Burleson Construction Company.

Van R. Michael, Sweetwater, Tennessee; and Edwin H. Arnold, Loudon, Tennessee, for the appellee, Phillips Contractor's and Management, LLC.

OPINION

I. Background

In August of 2005, the plaintiff, Phillips Contractor's and Management, LLC, (the "Contractor") contracted with the defendants, Stealth Group, LLC; Double T. Builders, LLC; and Dave Burleson Construction Company ("the Developers"), to install water lines, sewer lines, and underground electric services in the Developers' Loudon County subdivision. For this work, the Developers agreed to pay the Contractor the sum of \$89,600. Pursuant to the contract, the Contractor was to install lines and services in the interior of the subdivision and an exterior sewer line to connect to the main sewer line of the Loudon County Utilities Board ("LCUB"). After the

interior work was completed, inspected, and approved by LCUB, the Developers paid the Contractor the sum of \$47,450, which left a balance of \$42,150 remaining due under the contract for the exterior sewer line installation. However, before work began on the exterior sewer line, the Developers determined that the line should be installed using existing line sleeves, rather than by laying new line, as had been contemplated by the parties at the time of contract. The Contractor testified that this change from the original plan would require a change of pipe materials and the services of a specialty contractor, and would result in a cost increase of approximately \$7,000 over the original contract price. The Contractor refused to install the exterior line under the proposed changed conditions unless the Developers agreed to increase the original contract price by this amount. The Developers did not agree to the price increase, fired the Contractor, and thereafter, hired another contractor to install the line. This second contractor installed the exterior sewer line for a much lesser amount- only \$7,652.50, which was \$34,506.50 less than the balance due on the original contract before the change order.

The Contractor sued the Developers, seeking to recover \$43,155.32, which represented the total contract amount of \$89,600, less the payment of \$47,450, plus interest in the amount of \$1,005.32. By answer and countercomplaint, *inter alia*, the Developers denied that they owed any amounts to the Contractor under the contract and alleged that they had been forced to terminate the contract because the Contractor had breached the contract by its failure to complete its contractual obligations in a timely and workmanlike manner. After a non-jury trial, the trial court entered its final decree, dismissing the Developers' cross action and awarding the Contractor a judgment in the amount of \$29,858.66. It appears that this award was based upon the total \$43,155.32 requested by the Contractor, less \$13,296.66 credited to the Developers by agreement of the Contractor for monies the Developers paid to three businesses that supplied materials for the project. The Developers appeal.

II. Issue

The sole issue we address is whether the trial court erred in its award of damages by granting the Contractor the gross amount due under the contract rather than the Contractor's net profit under the contract.

III. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co.***, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

It is well-settled that “the purpose of assessing damages in breach of contract cases is to place the plaintiff as nearly as possible in the same position she would have been in had the contract been performed, but the nonbreaching party is not to be put in any better position by recovery of damages for the breach of the contract than he would be if the contract had been fully performed.” *Cantrell, et al. v. Knox County Board of Education, et al.*, 53 S.W.3d 659, 662 (Tenn. 2001) (emphasis omitted) (citing *Lamons v. Chamberlain*, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993)).

IV. Analysis

The proper measure of damages when an owner, or as in this case, ‘developer’, improperly terminates a contract after the contractor has partially performed is the net profits the contractor would have made had it been allowed to complete its work as contracted. *McClain v. Kimbrough Const. Co., Inc.*, 806 S.W.2d 194, 200 (Tenn. Ct. App. 1990). Such lost profits need only be proven with reasonable certainty and may be calculated by one of the following three formulas:

(1) The contract price (or so much as remains unpaid) less the amount that it would cost the builder to complete the job. This is the simplest and, where the builder can prove with reasonable certainty the cost of completing, the best. (2) The profit on the entire contract (total contract price less total builder’s cost of construction, both expended and to be expended) plus the cost of the work actually performed. (3) For the work done, such proportion of the contract price as the cost of the work done bears to the total cost of doing the job, plus, for the work remaining, the profit that would have been made upon it.

Id. at 200-01 (citing C. McCormick, *Handbook on the Law of Damages* § 164, at 641 (1935)).

Regardless of which of these formulas is used, “damages for lost profits must be based on net profits, not on ... gross profits,” and “‘net profits’ means gross profit *minus the ‘costs necessary to achieve those gross profits.’*” *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 59 (Tenn. Ct. App. 2004)(citing *First Tenn. Bank, Nat’l Ass’n v. Hurd Lock & Mfg. Co.*, No. 117, 1988 WL 86493, at *3 (Tenn. Ct. App. Aug. 19, 1988))(emphasis added).

In the instant matter, the trial court based its award of damages on the full contract amount and did not consider any costs that would have been incurred by the Contractor in performing the remaining work under the contract. “The party seeking damages has the burden of proving them,” *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999), and therefore, in order to recover expected lost profits, the Contractor had the burden of proving not only the gross income it would have received had the contract been performed, but “also the expenses [it] would have incurred to produce that income,” *see Waggoner Motors, Inc.*, 159 S.W.3d at 59. Because the trial court’s award failed to consider costs of performance, it placed the Contractor in a better position than it would have been had the contract been fully performed.

The Contractor asserts that “it is not the purpose of a suit for damages to reward the breaching party by allowing him to profit from his breach,” apparently contending that, unless the Developers are required to pay the full amount that would have been due had the contract been completed, the Developers will benefit from having breached the contract. The Contractor presents no legal authority in support of this argument, and it is our determination that, while limiting damages to lost net profits will result in a diminishment of the total monies that the Developers would have expended under the contract, an award of damages in excess of lost net profits is contrary to the law which, as we have noted, provides that the proper measure of damages in a case such as this is lost net profits. To hold otherwise would be to grant a windfall to the Contractor.

V. Conclusion

For the reasons set forth herein, the judgment of the trial court awarding damages to the Contractor in the amount of \$29,858.66 is vacated, and because the record does not present sufficient evidence to enable us to calculate a proper damage award, we remand the case to the trial court for recalculation of damages upon the Contractor’s presentation of adequate proof of lost net profits. Costs of appeal are assessed to the appellee, Phillips Contractor’s and Management, LLC.

SHARON G. LEE, JUDGE